

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
3 -----x

4 JACKPOCKET, INC.,

5 Plaintiff,

6 v.

22 CV 5772 (LJL)

7 LOTTOMATRIX NY LLC, *et al.*,

8 Defendants.

Conference  
(via Telephone)

9 -----x  
10 New York, N.Y.  
11 October 4, 2022  
12 12:30 p.m.

13 Before:

14 HON. LEWIS J. LIMAN,

15 District Judge

16 APPEARANCES

17 FINNEGAN HENDERSON FARABOW GARRETT & DUNNER LLP

18 Attorneys for Plaintiff

19 BY: DOUGLAS A. RETTEW

20 PATRICK J. RODGERS

MARY KATE BRENNAN

21 QUINN EMANUEL URQUHART & SULLIVAN LLP

22 Attorneys for Defendants

23 BY: RACHEL E. EPSTEIN

24 DONALD J. REINHARD

25 TODD ANTEN

1 (Case called)

2 THE COURT: Who do I have on for the plaintiff?

3 MR. RETTEW: Your Honor, this is Doug Rettew from  
4 Finnegan Henderson here on behalf of the plaintiff. I have  
5 with me my colleagues, Patrick Rodgers and Mary Kate Brennan.

6 THE COURT: Who do I have on for defendant?

7 MS. EPSTEIN: Good afternoon, your Honor, Rachel  
8 Epstein from Quinn Emanuel for defendants, and I have my  
9 colleagues Todd Anten and Don Reinhard with me.

10 THE COURT: Good afternoon, Ms. Epstein.

11 I want to discuss with you all the hearing for October  
12 11 and then how to bring this to conclusion with respect to the  
13 permanent injunction.

14 Mr. Rettew, I am going to start with you. You  
15 objected to me consolidating the preliminary injunction with a  
16 hearing on the permanent injunction and accelerating that.  
17 What's the basis for your objection?

18 MR. RETTEW: Your Honor, we obviously are moving  
19 forward with the preliminary injunction before the Court next  
20 week, but we have requested a jury trial in this case. So our  
21 preference is to have your Honor adjudicate the preliminary  
22 injunction and then for us to finish discovery and then  
23 eventually have the full trial before a jury.

24 THE COURT: With respect to your request for  
25 injunctive relief and an accounting under the federal trademark

1 law, you don't disagree, do you, that those are matters for me  
2 and not for a jury?

3 MR. RETTEW: The injunction for sure, your Honor, but  
4 the issue of monetary damages would be one for a jury.

5 THE COURT: For an accounting under the Lanham Act?

6 MR. RETTEW: Yes. For actual damages, your Honor, I  
7 believe that does trigger the right to a jury.

8 THE COURT: I had asked about for an accounting.

9 MR. RETTEW: I'm sorry, yes. Accounting of profits,  
10 your Honor. If it's purely equitable, then that would be  
11 equitable. But for a claim for damages vis-a-vis reasonable  
12 royalty or diminution of brand, that would be a damage that  
13 would trigger the right to a jury.

14 THE COURT: Is there any reason, Mr. Rettew, that it  
15 wouldn't be efficient and wise for me to try the injunctive  
16 case just itself and then, depending on how that comes out, if  
17 there is a basis for a claim for damages, I'll deal with that  
18 later on and you can try that later on?

19 MR. RETTEW: I think, your Honor, if your Honor issued  
20 an injunction, then we would absolutely -- we would have no  
21 issue.

22 THE COURT: No. You're mishearing me. What I'm  
23 saying is that I would be prepared to address your final  
24 request for an injunction and your final request for an  
25 accounting. You can try everything that is tried to me.

1           If there is anything that remains after you have tried  
2 everything that gets tried to me that gets tried to a jury, we  
3 can at that point discuss scheduling the jury trial and  
4 conducting the jury trial in a way that does not infringe at  
5 all on your client's Seventh Amendment rights.

6           MR. RETTEW: Yes. Your Honor, forgive me. I just  
7 want to make sure I understand it correctly. I think if your  
8 Honor adjudicates the preliminary injunction, then that would  
9 be the preliminary injunction. But then the jury would still  
10 have the ability to adjudicate whether there would be -- your  
11 Honor has the equitable power on the final injunction, but  
12 typically I think that would go before a jury as well.

13           Is your Honor thinking of a bifurcation where it would  
14 only be monetary damages?

15           THE COURT: I'm not thinking of an advisory jury with  
16 respect to your request for injunctive relief. To be  
17 specific -- and then, Ms. Epstein, I will turn to you -- I'm  
18 thinking that we will start on October 11. You will present  
19 your case. The defendants will present whatever case they want  
20 to on October 11. And then we will continue on November 14.  
21 And on November 14, I will issue a ruling with respect to  
22 whether there is permanent injunctive relief that's appropriate  
23 in this case.

24           You can make your claim for a preliminary injunction  
25 right after we have the hearing on the week of the 11th next

1 week. The evidence that is offered at the time of the  
2 preliminary injunction will all be before me in connection with  
3 the permanent injunction, but I am going to resolve this case  
4 in terms of the request for injunctive relief quickly and final  
5 injunctive relief.

6 MR. RETTEW: Your Honor, one concern we have is that  
7 while we believe we have strong evidence for a preliminary  
8 injunction, one concern we have is, we have done expedited  
9 discovery, but there is more to be done and there are more  
10 depositions and potentially some discovery disputes and other  
11 issues. Obviously, we are concerned that November 14 would be  
12 too quick to resolve the remaining issues that we would have  
13 apart from the preliminary injunction.

14 THE COURT: Well, tell me what it is that you would  
15 need that you are not getting and that would prevent you from  
16 trying the permanent injunction by November 14.

17 MR. RETTEW: One issue, your Honor, is, we requested  
18 documents -- there is a document request for the documents that  
19 the defendants have that have the word -- the term, the  
20 trademark Jackpot in it, and there has been a dispute on  
21 whether that is too burdensome. I know the defendant said  
22 there were around 2,000 hits. We have asked for that, and  
23 that's one area of disagreement.

24 The other issue too is, we have taken depositions of  
25 the main witnesses, but there are other potential witnesses

1 that need to be deposed. The witness yesterday for the  
2 defendant knew some stuff, but there was a lot of things he  
3 didn't know, so that potentially we had have to depose some  
4 other witnesses. So we have the issue on the documents, the  
5 production, and then also, again, potentially some other  
6 depositions that would need to be taken.

7 THE COURT: How many depositions?

8 MR. RETTEW: I would say, just from yesterday,  
9 probably there is at least two people we have identified that  
10 would also need to be deposed.

11 THE COURT: Who are those individuals?

12 MR. RETTEW: One is Roy Moore, and potentially the  
13 defendant's U.S. CEO, Akshay Khanna. This deposition went late  
14 last night and there may be one or two other names. I'm not  
15 certain offhand, your Honor. I know there were at least two  
16 names of people that potentially would need to be deposed also.

17 THE COURT: We are now on October 4. Is there a  
18 reason why those depositions couldn't be done in the next  
19 month?

20 MR. RETTEW: I suppose we could. My concern was with  
21 all of the different things that need to be done, your Honor,  
22 but we could certainly keep sprinting.

23 THE COURT: Is there anything else that would prevent  
24 this case from being tried and completed with respect to the  
25 request for equitable relief by Thanksgiving?

1                   MR. RETTEW: I would say, your Honor, I'm pausing just  
2 because the discovery has been fast and furious and there are  
3 deficiencies that we have all been identifying, and I would  
4 have to sit down. There are going to be some more things that  
5 we will probably need to bring before the Court on just the  
6 scope of discovery and what has been produced and what has not  
7 been produced. I would envision that may be likely.

8                   THE COURT: Ms. Epstein, let me hear from you.

9                   MS. EPSTEIN: Of course, your Honor.

10                  I am going to try to take this in order.

11                  First of all, we think that this plan makes perfect  
12 sense, as we put in our letter, and we don't actually believe  
13 that currently there is any right to a jury trial. As your  
14 Honor noted, both the accounting and the equitable or the  
15 injunctive relief are equitable and don't give rise to a jury  
16 trial.

17                  Further, there can't be any actual damage, as we  
18 haven't started offering our product in the United States, and  
19 I raised this previously with Mr. Rettew.

20                  So our view is, as of now, there is no jury trial to  
21 be had. And of course to the extent that we voluntarily go  
22 into the market and potentially cause damage, that's of course  
23 a risk that we take with our eyes wide open. As of now, we  
24 don't think that there is anything other than a bench trial to  
25 be had in this case.

1           In terms of the discovery, we may also want to take a  
2 couple of more depositions, and of course there are  
3 deficiencies that the other side has, but we don't see any  
4 reason that we couldn't get this done in time for a trial  
5 before Thanksgiving.

6           For us, it really is an existential threat. This is  
7 an URL that we have been doing business under for the better  
8 part of a decade. Plaintiffs have been aware of us since at  
9 least 2015. Plaintiff -- we deposed their CEO the other day  
10 and it became very clear that he had our step-by-step entry  
11 plan into the U.S., but that he didn't credit it and therefore  
12 took no action because he felt it was aspirational because we  
13 had not yet rented off his space, if I'm paraphrasing a bit.

14           Essentially, they sat on this and let us raise capital  
15 under this name, let us move forward with launch, and now our  
16 launch has been delayed as a result of this suit. So it's very  
17 important for us to get this resolved as expeditiously as  
18 possible.

19           THE COURT: Let me ask a couple of other questions,  
20 first to the plaintiff.

21           On the understanding that we are going next week, at  
22 least with respect to your request for preliminary injunctive  
23 relief, who are your witnesses who you would present next week?

24           MR. RETTEW: Next week, your Honor, we present the  
25 CEO, Mr. Sullivan, and then our survey expert.

1                   As we noted at the last conference, we have agreed to  
2 submit those by written declaration, and they will just be  
3 cross-examined at the hearing, given the timing.

4                   But I just want to note that I do disagree with  
5 counsel's recitation of the merits, and I'm happy to address  
6 those with your Honor, but I'm happy not to, if you don't want  
7 to hear that.

8                   THE COURT: I will hear them. I don't want to cut you  
9 off. Let me just ask the questions that I've got and then I'll  
10 come back to you.

11                  My recollection from our last conversation is that we  
12 have not set a date certain for the declarations. Frankly,  
13 given the timing of this, I would be fine if you get them to me  
14 really any time before the hearing sufficient for me to be able  
15 to review them in advance of a hearing.

16                  Have you discussed, Mr. Rettew, with your adversary  
17 the timing of the submission of the declarations?

18                  MR. RETTEW: Yes, your Honor. The date we were  
19 talking about was to exchange them on Sunday night.

20                  THE COURT: That makes a lot of sense. From my  
21 perspective, that gives me all of Monday and it gives you all  
22 of Monday to look at them.

23                  Mr. Rettew, before I turn back to you, let me go back  
24 to Ms. Epstein.

25                  Ms. Epstein, who would your witnesses be for next

1 week?

2 MS. EPSTEIN: Your Honor, we will have Yariv Ron, who  
3 is our international CEO, and we will have our survey expert  
4 Dr. Itamar Simonson, our survey expert.

5 THE COURT: Ms. Epstein, I take it that what I heard  
6 from Mr. Rettew also reflects your agreement that by Sunday  
7 night you'll exchange the declarations and you will submit them  
8 to the Court?

9 MS. EPSTEIN: Yes, your Honor.

10 THE COURT: In terms of the submission of them to the  
11 Court, just to discuss logistics for a moment, these need not  
12 be filed. They will be marked as exhibits, as court exhibits  
13 and made part of the record of the hearing. You can email them  
14 to the Court chambers email. If there are documents or  
15 exhibits that are bulky, you can either email the exhibits to  
16 us or you can be on the phone with my courtroom deputy -- we  
17 don't need the court reporter for this -- who can give you  
18 instructions on how to transmit them to us through the email  
19 tools and the electronic tools whose names I don't remember.  
20 But I'd like all that by Sunday night and hard copies of  
21 declarations and the exhibits on Monday, two copies, one for me  
22 and one for my law clerk, so that I can have them on the bench  
23 on Tuesday.

24 The way Tuesday will proceed is that when the witness  
25 is called, I will mark the declaration as a court exhibit. I

1 will ask the witness whether, understanding that the  
2 declaration is intended to be their direct testimony in the  
3 case, they swear or affirm to the truth of the statements in  
4 it. Assuming that they do so swear, the declarations will be  
5 admitted into evidence and then cross-examination will proceed.

6 I have never had a witness say that they do not swear  
7 to the truth of the declaration. If that happens, we will  
8 figure out what to do on the spot.

9 If there are objections as to any of the statements in  
10 the declarations, you can raise them to me by letter submitted  
11 on Monday, but keep in mind that this will be a trial to the  
12 Court, and I'm perfectly capable of understanding the weight of  
13 evidence and, in all likelihood, if there is a substantial  
14 evidentiary issue, I would reserve on it because it very well  
15 may be the case that I don't need to resolve that evidentiary  
16 issue.

17 Any questions about that, Mr. Rettew, before I return  
18 to the points that you wanted to make about the --

19 MR. RETTEW: No, your Honor.

20 THE COURT: Ms. Epstein, any comments or objections?

21 MS. EPSTEIN: The only question, your Honor, is for  
22 hard-copy deliveries, will the Court be open on Monday? I  
23 believe it's a holiday.

24 THE COURT: Good point. Why don't you make sure you  
25 bring them with you on Tuesday morning.

1 MS. EPSTEIN: Of course, your Honor, which actually  
2 remind me of a related point that Mr. Rettew and I had  
3 discussed, which is technology in the courtroom.

4 THE COURT: If you need court orders, submit them to  
5 me, which you can do by email. If you need to come into the  
6 courtroom to test out anything, Matt, correct me if I'm wrong,  
7 talking to my courtroom deputy, but I think this Thursday or  
8 Friday might work for that.

9 Matt.

10 THE DEPUTY CLERK: Yes, that's right, judge. Thursday  
11 or Friday if counsel wants to come in and test that equipment,  
12 it would be fine.

13 MS. EPSTEIN: Thank you. Perhaps we will get together  
14 and have our trial assistants get in touch with the courtroom  
15 deputy, if that makes the most sense.

16 THE COURT: That does. Thank you. If you are able to  
17 have the personnel on both sides come in at the same time, I  
18 think that would be easiest for the Court and probably  
19 eliminates any issues. Ms. Epstein, you will work on that.

20 Mr. Rettew, you wanted to say something?

21 MR. RETTEW: Yes, your Honor. I just wanted to  
22 respond to Ms. Epstein's point about the domain name. We will  
23 show this next week.

24 I think one critical part of this case is, although  
25 the defendant has owned his domain name for several years, it

1 has not operated in the United States and it has not offered  
2 the services at issue in the United States that are at play  
3 here.

4 And our injunction that we are seeking is not against  
5 the domain name itself, but against the very specific issue of  
6 their trademark Jackpot in connection with the very specific  
7 service, which is lottery courier services.

8 I just wanted to comment on that because it is not the  
9 case that the plaintiff has been sitting by watching the  
10 defendant operate. It hasn't even started operating in the  
11 United States, which is why we believe that the time is right  
12 for a motion for preliminary injunction, because they have not  
13 even come here yet and that has already caused actual  
14 confusion, which we will show your Honor.

15 THE COURT: That's helpful. I have looked at the  
16 papers in the case, and I think I understand the issues on both  
17 sides.

18 We will then have a hearing on the application for the  
19 preliminary injunction which will start on October 11.

20 On November 14, we will have a trial to the Court of  
21 the request for the permanent injunction and equitable relief,  
22 including the request for an accounting. I'll give you the  
23 time that we will start in a moment on that.

24 The testimony that will be received next week will  
25 also be considered by the Court in connection with a permanent

1 injunction hearing beginning on November 14. But on November  
2 14, anything that you didn't offer earlier which is not  
3 redundant or duplicative of what I'm hearing next week, you  
4 will be able to present the plaintiff going first and then the  
5 defendant.

6 Matt, I would think on November 14 we could start at  
7 9:30 in the morning, if that makes sense.

8 THE DEPUTY CLERK: Yes, that's right, Judge, we can.

9 THE COURT: 9:30, Mr. Rettew?

10 MR. RETTEW: Yes, your Honor.

11 One question, your Honor. How many days would your  
12 Honor anticipate? This being a one-day hearing?

13 THE COURT: On the 14th?

14 MR. RETTEW: Yes.

15 THE COURT: I think I've got that week free. I'm not  
16 inviting you to use up the entire week, but I do have that week  
17 free and we can discuss next week, after you have had time to  
18 think about it, how much time you are going to need, and I'll  
19 hear from the defendant how much time they are going to need.

20 MR. RETTEW: Thank you, your Honor.

21 The one reason I want to raise this, the timing on  
22 that particular week, is particularly, there is one issue I  
23 have. That is, I had scheduled a short several-day vacation to  
24 go visit my daughter, but it wasn't going to be until  
25 Wednesday. I'm hoping we would be done by then and hopefully

1 that would be -- having done the preliminary injunction and  
2 having that evidence, I can't imagine it would take more than  
3 two days, but I just wanted to raise that one issue.

4 THE COURT: Actually, Mr. Rettew, if on the margin  
5 getting an extra half hour or hour on the Monday and Tuesday  
6 would permit us to finish and you to keep your commitments, the  
7 Court would be prepared to start at 9:00 in the morning and go  
8 a little bit later each of the days, Monday and Tuesday.

9 MR. RETTEW: Thank you, your Honor.

10 THE COURT: Ms. Epstein, anything from you?

11 MS. EPSTEIN: Just a couple of questions in terms of,  
12 what time are we starting next week? The same time as set?

13 THE COURT: Let me look at the calendar. You should  
14 get to the courtroom by 8:30 or 9, and I think we will start  
15 promptly at 9:30 in the morning.

16 MS. EPSTEIN: OK, your Honor. I believe it was  
17 currently set for noon. Your Honor would prefer us in the  
18 morning?

19 THE COURT: I can do the morning, if that works for  
20 you and it works for Mr. Rettew. You are right, it is set for  
21 noon. But I can start earlier, Ms. Epstein.

22 MS. EPSTEIN: I defer to Mr. Rettew on that.

23 THE COURT: Mr. Rettew.

24 MR. RETTEW: Yes, we can do that, your Honor.

25 THE COURT: Let's start at 9:30.

1 MS. EPSTEIN: Our other question, I think that  
2 Mr. Rettew and I had discussed whether your Honor would like  
3 openings and closings next week or if you would prefer a legal  
4 argument or if you would prefer neither.

5 THE COURT: I don't need opening statements. I've got  
6 the briefs. I think it would be helpful to have closing  
7 statements and to have closing statements that are directed  
8 both to the evidence that I will hear and to the law, because  
9 there are a lot of legal issues the two of you have raised. I  
10 think, given that we have got declarations, we can proceed to  
11 argument and closing statements right after the close of the  
12 evidence.

13 MS. EPSTEIN: Absolutely, your Honor.

14 THE COURT: I've got a couple of things for next week  
15 that are not easily moved. One of them is a proceeding that  
16 I've got at 2:00 on the Wednesday that should last for about an  
17 hour and a half. The other things I think I've got can  
18 probably be moved.

19 Do you have a sense, from the defendant's perspective,  
20 how long your cross-examinations are going to last?

21 MS. EPSTEIN: I think, your Honor, that we will be  
22 able to finish both sides in one day, unless Mr. Rettew  
23 disagrees.

24 MR. RETTEW: I would agree with that, your Honor.

25 THE COURT: Good.

1           I had one other thing for you, Ms. Epstein, unless you  
2 have anything else for me.

3           MS. EPSTEIN: No, your Honor.

4           THE COURT: The one thing that I've been puzzling  
5 about a little bit, but I think I have the answer, is a couple  
6 of your clients have asserted objections on the basis of  
7 personal jurisdiction. I don't think that I need to resolve  
8 those issues when I have the trial with respect to the  
9 permanent injunction and equitable relief. If there remain  
10 issues with respect to those individual defendants, I believe  
11 that I can address those after the 14th. In other words, the  
12 hearing on the 14th would be with respect to the client of  
13 yours as to whom there is clearly personal jurisdiction.

14           MS. EPSTEIN: We agree with that, your Honor, assuming  
15 that our appearance is on a nonwaiver basis of any personal  
16 jurisdiction issues.

17           THE COURT: Mr. Rettew, any objection to that?

18           MR. RETTEW: No, your Honor.

19           THE COURT: Anything else, Mr. Rettew?

20           MR. RETTEW: One other question for your Honor. For  
21 the hearing on the 14th, would you envision that we would do it  
22 like the preliminary injunction hearing in that the direct  
23 testimony would come in by declaration, if there is testimony  
24 beyond what we have, or are you thinking, because it's just a  
25 bench trial, that it is something else?

1           THE COURT: I think it would be most efficient if it  
2 comes in by declaration.

3           MR. RETTEW: The 14th would be similar to the PI, but  
4 it would be any additional evidence that we would want to  
5 submit.

6           THE COURT: Correct.

7           MR. RETTEW: Thank you.

8           THE COURT: Ms. Epstein, anything?

9           MS. EPSTEIN: No, thank you, your Honor.

10          THE COURT: I will ask you both to order a copy of the  
11 transcript on an expedited basis, and that request will  
12 continue on through the two hearings, that you order copies of  
13 the transcript on an expedited basis. It's just much helpful  
14 for the Court to have it.

15          Stay on with the court reporter and my deputy about  
16 the ordering of the transcript and about any logistics for  
17 testing out equipment for next week.

18          Thank you, all.

19          (Adjourned)